

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE E. PIERCE,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 259583

Wayne Circuit Court

LC No. 01-014270-01

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of criminal sexual conduct in the third degree (CSC III), MCL 750.520d(1)(b), and was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of ten years to life. We affirmed defendant's convictions but vacated his sentence and remanded for resentencing on the ground that the sentence violated MCL 769.9(2).¹ Defendant was resentenced to 14 to 25 years in prison. He appeals as of right, and we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court improperly sentenced him outside the sentencing guidelines. Rescoring during defendant's initial sentencing reduced the guidelines range from 51 to 170 months to 30 to 100 months. Offense Variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior), was reduced from 50 points to zero points because defendant's prior offenses did not meet the five-year cumulative period specified in OV 13.

In justifying the departure, the trial court cited defendant's pattern of sexual assault crimes, the fact that he had also failed to register as a sex offender, MCL 28.723, and his recidivism, which included the fact that defendant began sexual relations with a minor shortly after his release from prison. The trial court observed that because one of defendant's prior offenses involved a home invasion, anyone could be defendant's next victim, and that defendant presented a greater danger to society.

¹ *People v Pierce*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2004 (Docket No. 244276).

In reviewing a departure from the guidelines range, we review the existence of a particular factor for clear error, the determination that the factor is objective and verifiable as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure for an abuse of discretion, and the extent of the departure for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, we give deference to the trial court in light of its familiarity with the facts and the offender. *Babcock*, *supra* at 270.

A court may depart from the sentencing guidelines if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the sentencing guidelines based on an offense or offender characteristic already considered in determining the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock*, *supra* at 257-258. To be objective and verifiable, factors must be actions or occurrences external to the mind and must be capable of being confirmed. *Abramski*, *supra* at 74. We review a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, *supra* at 262, 264.

Defendant argues that the reasons used by the trial court were not substantial and compelling, and were already taken into account by the guidelines scoring.

After reviewing the record presented, we agree with the trial court's determination that defendant's criminal history shows a pattern of predatory conduct. We agree that this factor was not adequately reflected in the guideline scoring variables. As noted above, defendant's criminal history does not squarely fit within the parameters of OV 13. MCL 777.43. The sentencing guidelines accounted for defendant's prior record, MCL 777.51-MCL 777.56, but they did not reflect the predatory recidivism indicated by defendant's two prior convictions for attempted CSC III, his conviction of CSC III in the instant case, his almost immediate return to deviant sexual conduct after release from prison, and his attempt to conceal his danger to others by failing to register as a sex offender. We find defendant's criminal history to be an objective and verifiable basis for the trial court to sentence defendant outside of the guidelines range.

We agree that defendant's predatory conduct presents a substantial and compelling reason for departing from the guidelines. Minimally, there was no abuse of discretion. A "defendant's extensive criminal history reflecting that past sentences of probation, jail, and prison had not deterred him, and the trial court's legitimate concern for the protection of society, justify . . . a prison sentence [exceeding the guidelines]." *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004). Defendant's sentence is proportionate to the seriousness of his conduct and criminal history. *Babcock*, *supra* at 273.

In summary, the trial court properly found that these objective and verifiable factors were given inadequate weight by the guidelines, MCL 769.34(3)(b), and did not abuse its discretion by concluding that the factors constituted substantial and compelling reasons for exceeding the guidelines.

Next, we reject defendant's argument that he is entitled to resentencing pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court held that *Blakely* is inapplicable to Michigan's sentencing scheme. We are bound by *Claypool*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).²

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

² Our Supreme Court granted leave to appeal in *Drohan, supra*, limiting its review to whether *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme. See 472 Mich 881 (2005). That appeal is still pending.